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Brief of Atty. Gen'l (Whitney)

O. E.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Herman Keck, plaintiff in error, was indicted for the smuggling, on February 11, 1896 (the date 1890 in the indictment, on page 1 of the record, being a copyist's error), of certain diamonds at the port of Philadelphia. He was tried before Judge Butler and a jury May 27, 1896, and convicted upon the first and second counts of the indictment (the third count having been excluded from consideration of the jury).

The first count of the indictment is drawn under § 3082 of the Revised Statutes, which makes it criminal—

> If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law. * * *

The second count is based on § 2865, which makes it criminal—

> If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty. * * *

STATEMENT OF FACTS.

Herman Keck, plaintiff in error, is connected with various corporations doing business at 19 and 21 West Fourth St., Cincinnati, Ohio, a building bearing the signs of the Keck Manufacturing Company, the Keck Diamond Company, and the Coeterman-Henrickson-Keck Diamond Company. Franz Van Reeth is a diamond cutter connected with the last named concern, receiving a third of the profits thereof for his services. Frank Loesewitz is captain of the steamer *Rhynland*, of the International Navigation Company, now plying between Philadelphia and Liverpool. He is a citizen of Antwerp, in the Kingdom of Belgium. Franz Von Hemmelrick is a jeweler in Antwerp, a friend of Loesewitz (p. 23), and at least an acquaintance of Keck (p. 100).

Keck testifies that he is a manufacturing jeweler, and that the company last named was organized for the purpose of cutting diamonds, so that it imports diamonds only in the rough. For the Herman Keck Manufacturing Company he has imported cut diamonds (p. 96). He admits that he went to Antwerp in January, 1896, stating that his business was to buy rough diamonds for the Coeterman-Henrickson-Keck Diamond Company; and he

admits that on January 27, 1896, he was in the city of Antwerp upon that business (pp. 96–7). The transactions which, as found by the jury, made him responsible for the subsequent smuggling at Philadelphia, occurred in Antwerp on that day.

The testimony as to the main points in suit is in conflict, Keck even denying that he knew Captain Loesewitz at all, although Loesewitz was able to describe his personal appearance so well that the revenue officers were able to pick him out without difficulty among the passengers of a large ocean steamer when he reached this country in the following month. The testimony in the case for the Government rested upon the testimony of Captain Loesewitz, corroborated in important particulars by other witnesses. The Government's case was in brief as follows:

Captain Loesewitz, on January 27, 1896, was making a social call on Mrs. Von Hemmelrick, at Antwerp, when her husband came in with Keck and proposed that they should go out and have a glass of beer. Loesewitz had never met Keck before, and can not even remember whether he was introduced by name. The party went to the *Café Alsacienne*, on the Place Vert. This was in the afternoon, at a time when, according to the custom of Antwerp, Government offices are closed and people go into the restaurants to play cards and dominoes, write their letters, etc. There is always ink on the tables.

During the conversation Von Hemmelrick took a small package out of his pocket and showed it to the captain, saying: "This package belongs to that gentleman here,"

adding: "Will you oblige me to take that over to America? It belongs to him. It belongs to that gentleman. He is a customer of mine. It does not contain any valuables." Keck also said that it contained no valuables. The captain noticed that there was no address on the package, and said to Keck: "Where shall I send it to?" Keck then tore a piece of paper off a card lying on the table and put an address on it. The address was T. van Reeth, 21 or 24 4th st., Cincinnati. The paper was produced in the court. After staying about a quarter of an hour in the café, the party walked out and separated on the Place Vert. Before separating, Keck told the captain to send the parcel by Adams Express. He did not state what was in the package, nor explain who Van Reeth was, and the captain did not see him again before he left Antwerp the same night (pp. 23–6, 37, 40).

Captain Loesewitz sailed on the *Rhyland* January 29. He did not invoice or manifest the box (pp. 26–7, 73).

On arriving at quarantine on the river, a couple of custom house officers boarded the vessel, which landed in Philadelphia half an hour or an hour later, on February 11, 1896, about four or five o'clock in the afternoon. After the passengers were all ashore, the captain received a call from two gentlemen with whom he was not acquainted. They were Messrs. John C. Gallen and James C. Cummings, special agents of the Treasury Department (pp. 27, 36, 43, 59). These gentlemen were following up information which they had received through Mr. Frankel, secretary of the Diamond Cutters' and Importers' Protective Association (p. 61), which is an association to prevent the violation of the revenue laws in the

matter of the importation of jewelry, composed of the most reputable diamond brokers in New York City and of the entire dealers of the United States (p. 62).

Captain Loesewitz and the two Treasury agents each give an account of the conversation, the accounts being substantially the same, though, of course, varying slightly in detail. The captain's account is as follows (p. 27):

> When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, "Yes." I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, "Captain, that's a package of diamonds you have got to be sent to Cincinnati," and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened.

Mr. Gallen states that on the arrival of the *Rhynland* he first examined the passenger list to find Keck, and the manifest to find diamonds, in both respects without result. After attending to one or two other matters, he states that he went into the chart-room, where the captain was, with Mr. Cummings. His account of the conversation is as follows (pp. 43–4):

> I spoke of the weather and other topics, and then I said, "Captain"—to whom I was unknown—"you have a package for the Coeterman Diamond Company—the Coeterman-Keck Diamond Company, 24 West Fourth Street, Cincinnati, Ohio?" I repeated

the name of the company. He said, "No; I have no such package." I said, "I beg leave to differ with you," and, indicating with my fingers, I said, "You have a small package which you received while in Antwerp." He said, "I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, and I will give it to you if you have an order for it."

Q. At that time, I understand you to say, he did not know you were a Treasury agent?

A. No, sir; I was unknown.

Q. Had you ever met him before?

A. Never met him before to know him. I then said, "Captain, I have an order for them." He said, "Show me the order, and I will go and get the package." I replied, "Captain, I would like to see the package first before delivering the order, and I want to speak to you in private."

Q. Was there anything on your clothes like a badge or anything else to show what you were?

A. No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he finished, and I said, "Certainly." After the lapse of about five minutes the captain arose and said, "You remain here, and I can go and get the package." As soon as the captain left the chart-room I quietly and unperceived by him followed him and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it I said, "Captain, that is the package I want." He said, "Where is your order?" I produced my card as United States Treasury agent. He refused to let me have it until I was identified as a custom-house officer. A young man present at the conversation opposite the captain's room, who represented the steamship company—we agreed to

go back to the chart-room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did. I then searched thoroughly the captain's room and also other parts of the vessel, but did not find any other dutiable stuff, after which I went into the chart-room again and opened the package in the presence of the captain—broke the seal and opened the package.

Mr. Cummings gives the following account (p. 59):

A. I came in as the captain said he had a package for Van Reeth, Cincinnati.

Q. Did you hear whether he was asked that question before he answered it?

A. That I do not know.

Q. You just heard him say that as he entered?

A. Yes, sir; he then asked Mr. Gallen if he had an order for the package and Mr. Gallen said that he had, and the captain said, "Give me the order and I will give you the package." Then Gallen said, "Give me the package and I will show you the order." After the captain had finished writing off his log book the captain said he would go down and get it. He started down and Mr. Gallen followed him down the room, and I went down also, and the captain produced the package down in his room.

The box had no address whatever upon it. Mr. Gallen broke the seals and opened the package in the presence of the captain. It turned out to contain 563 diamonds, of which 28 were wrapped up separately in finer paper and placed in cotton. They were all cut diamonds dutiable at 25% (pp. 44–5, 59, 73). Although

these diamonds were subsequently appraised at $6,306.60 and libeled for forfeiture with due proclamation, no claimant for them ever appeared (pp. 74–9).

On the following day, February 12, Mr. Gallen had a further interview with the captain, who could not remember the name of the man from whom he had received the package, but "described him as a man about the size of Collector Reed, not quite as stout, a small, reddish brown moustache, small features, small eyes and blonde complexion." Gallen then went over to New York to await the arrival of the *Aller*, on February 14. He boarded her on a revenue cutter at Staten Island, identified a man corresponding to that description, went up and said to him: "Is your name Keck?" He said, "Yes." Keck then denied knowledge of Mr. Loesewitz or of the package which the captain had carried (pp. 46–7). Keck showed great indignation at the suspicions against him, and agreed to go to Philadelphia to meet the captain, but subsequently backed out of the agreement. Gallen testifies that he held the package so that Keck could not see it, and said, "Here is the package which belongs to your firm, the Coeterman-Keck Diamond Company of Cincinnati." Keck said, "There is no address on that package" (p. 48). Gallen answered, "That is a good description of the package. There is no address on it;" and added, "The captain was instructed to deliver it to Van Reeth, 21 4th St., Cincinnati, Ohio." Keck said, "That is a different firm from the Keck Company." Gallen said, "Are you not a member of the same firm as Van Reeth?" Keck said, "Yes, I am;" but denied

that the package belonged to that firm, and said, "I am the only one that has a right to purchase diamonds for either one of those concerns" (p. 49). Keck further said that he imported into the port of Cincinnati $100,000 worth of diamonds from the first of the year. Gallen replied that "I had a telegram in my pocket in reply to a telegram sent to the appraiser at the port of Cincinnati, and that the total amount of his importations of diamonds at the port of Cincinnati from the first of January to that date did not exceed the value of the assignment which I found in the possession of the captain at Philadelphia, and they were valued at $7,000." Keck then said, "What are the total amounts of my importations?" Gallen said, "You know. I am not going to tell you" (p. 50). Keck said to Inspector Donahue, who was watching him at this time, "it was ridiculous to detain him to suspect that he was smuggling in diamonds; that he was doing a business of nearly $300,000 a year, and was importing his diamonds regularly." He further said that he did all the buying of diamonds for the firm in Cincinnati (pp. 63, 68–9). He also admitted that he might have been at the *Café Alsacienne* on January 27 (p. 67).

Keck arrived in company with a young man named Van Reeth, who, he said, was a son of the manager of his firm (pp. 48, 64).

Keck was brought before the United States Commissioner for a hearing on February 18 (p. 11). The captain gives the date as March 18, which seems to be an error (p. 28). Captain Loesewitz had not previously seen him since the interview at Antwerp. There were quite

a number of people in the corridor making application to be naturalized. The captain was asked to identify the man that he got the diamonds from. After walking down to the foot of the corridor and back again, he recognized him, saying, "That is the man; no doubt about it" (pp. 57–8). At this hearing, also, the captain first produced the paper given him by Keck in Antwerp containing Van Reeth's address (pp. 50–1). The paper that was produced contained writing in some foreign language, either Flemish or Dutch (p. 104).

ARGUMENT.

I.

If either the first or second count of the indictment is good, the verdict must stand.

This is well settled, since the two counts describe the same criminal act. (*Claassen* v. *United States*, 142 U. S., 140, 146; *Evans* v. *United States*, 153 U. S., 584, 595; *Goode* v. *United States*, 159 U. S., 663, 669.) There is no difference in the degree of crime or the nature of the punishment.

II.

The second count in the indictment is good.

The first count is substantially in a form held insufficient in *United States* v. *Kee Ho*, 33 Fed. Rep., 333, and cases cited. As the second count seems undoubtedly good, it is unnecessary to discuss this one.

In discussing the second count, it should be borne in mind that, even though a demurrer be interposed, § 1025

of the Revised Statutes makes all merely formal objections unavailable after verdict, unless it appears "that the substantial rights of the accused were prejudiced." (*Connors* v. *United States*, 158 U. S., 408, 411.) Mere lack of particularity is not a sufficient ground for annulling an indictment. Defendant's remedy is by application for a bill of particulars. (*Durland* v. *United States*, 161 U. S., 306, 314, 315; *Dunbar* v. *United States*, 156 U. S., 185, 192; *Cochran* v. *United States*, 157 U. S., 286, 290.) The present indictment appears to be as full and particular as a defendant has any right to ask, and the objection on the ground of duplicity has been very properly dropped. (*Crain* v. *United States*, 162 U. S., 625, 636.)

The second count is very similar to one of those sustained in *Dunbar* v. *United States*, 156 U. S., 185; namely, the count set forth at pp. 186–7. The present indictment is fuller in the allegations of *scienter*. It omits to state the country from which the goods were imported, but this is not a vital matter and in no wise prejudiced defendant. It also omits to state the specific rate of duty applicable to the diamonds imported, merely alleging that there was a duty imposed upon them by act of Congress; but there is only one rate at which diamonds are dutiable, and the reason for the specific allegation in the Dunbar indictment was that there were several different rates of duty applicable to opium, which was the subject of the smuggling in that case.

Defendant complains that the indictment should have alleged specifically that these diamonds were not miners', glaziers', or engravers' diamonds, which are specially

mentioned in the free list (tariff act of August 28, 1894, par. 467); but it is not ordinarily necessary to negative exceptions in preparing indictments (*United States* v. *Cooke*, 17 Wall., 168), and the exception is sufficiently negatived in this indictment by the statement that the diamonds were subject to duty.

The defendant also insists that his attempt to defraud the Government could not constitute the crime of smuggling because all diamonds, by a true construction of the statute, are upon the free list, although the Treasury Department and the courts have ruled otherwise. The question was brought to this court at the last term by application for a writ of *certiorari* from a decision of the Circuit Court of Appeals for the Second Circuit. The writ was refused (163 U. S., 687). The arguments in favor of the dutiability of diamonds are to be found in the opinion of Judge Townsend at Circuit (*United States* v. *Frankel*, 68 Fed. Rep., 186), and in the brief filed by the undersigned upon that application. It is admitted, of course, that the denial of a writ of *certiorari* by this court does not necessarily involve a ruling upon the merits of the cause. It is, however, submitted that a question of dutiability once decided by the Court of Appeals, with which decision, upon such an application, this court has indicated concurrence (for in the Frankel case it was conceded that the magnitude of the amount involved was sufficient to warrant the issuance of a writ of *certiorari* if the question of law were a serious one), should not be reopened on behalf of an importer who is endeavoring to obtain free entry by fraud upon

the Government, instead of by application to the courts. The appellant in the case just cited was the very Mr. Frankel through whose efforts on behalf of the reputable diamond dealers of the United States this prosecution was instituted.

III.

The Government's testimony, having been found to be true by the jury, sustains the conviction.

(1) Keck was responsible for Loesewitz's illegal acts. Indeed, Keck alone was responsible for the enormity of the crime, Loesewitz supposing he was committing only a trifling irregularity of a kind familiar probably to most of the passengers on an incoming ocean steamer. If, then, Loesewitz smuggled or clandestinely introduced goods, Keck is responsible criminally.

It will be noticed that this section, like many others of the Revised Statutes, expressly provides that the criminal act should be *a misdemeanor*. This is doubtless done for the purpose of avoiding the technicalities of criminal law with respect to felonies. We are thus relieved from examining into the disputed question whether a person abroad, instigating or directing the commission of a felony here, is punishable.

It has always been well settled that there is no distinction between principals and accessories before the fact in misdemeanors, and that "he who procures another to commit a misdemeanor is guilty of the fact in whatever place it is committed by the procuree." (*Commonwealth* v.

Gillespie, 7 S. & R., 469, 478; *Commonwealth* v. *Ray*, 3 Gray, 441, 448; *Commonwealth* v. *Blanding*, 3 Pick., 304, 311; 1 Bish., New Crim. Law, § 656.)

Hence, whatever may be the case with regard to felonies (id., 651; *State* v. *Grady*, 34 Conn., 118, 129–31), it is well settled that in the case of misdemeanors "a crime is in law committed in the place where the doer's act takes effect whether he himself is in such place or not. * * * In this way one may even perpetrate an offense in a state or country upon whose soil he never set foot." (1 Bish., New Crim. Proc., § 53.) The trial of misdemeanants who never were personally within the territorial jurisdiction of the court is more common in prosecutions for conspiracy, such as *The King* v. *Brisac*, 4 East, 164, 170, and *Dealy* v. *United States*, 152 U. S., 539. It is, however, unnecessary that the indictment be in form for a conspiracy. Whether Loesewitz was so far implicated that an indictment for conspiracy against himself and Keck together would have been sustainable, or whether he was so far an innocent agent that he should be regarded merely as a tool in Keck's hands, the latter is responsible to the laws of the United States, and is to be tried within the particular district wherein the crime was committed. In one recent and familiar case, where the crime charged was the mailing of an unlawful letter from New York to Connecticut, the defendant was held for trial in the latter district, in which it did not appear that he had ever been personally present. (*In re Palliser*, 136 U. S., 257; see also *Horner* v. *United States*, 143 U. S., 207; *Commonwealth* v. *Smith*,

11 Allen, 243, 259; *Lindsey* v. *State*, 38 Oh. St., 507; *United States* v. *Rindskopf*, 6 Biss., 259, 268; 1 Bish. New Crim. Proc., §§ 57, 58.)

(2) Keck, through Loesewitz, smuggled the diamonds into the United States.

It is first necessary to ascertain the legal definition of the word "smuggled" as used in § 2865. The crime being statutory, the word has no common law definition which is of assistance in the present case.

§ 2865, in its present form, incorporates the language of the tariff act of August 30, 1842, c. 270, § 19. No authoritative definition of the word "smuggled" in that statute was ever made. The provision of that statute with relation to smuggling was assumed to be impliedly repealed by the act of July 18, 1866, c. 201, § 4, now Rev. St. § 3082, set forth at the commencement of this brief. For this reason the revisers in dealing with the act of 1842 omitted this provision. Whether or not the provision had been repealed in 1866, it was thus without doubt repealed on June 22, 1874. (Rev. St., §5596.)

On the same day, however, the Anti-Moiety Act was passed, which not only provides remedies against smuggling, but defines the word as follows (act of June 22, 1874, c. 391, § 4):

> That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination.

The act of February 27, 1877, c. 69, amended § 2865 of the Revised Statutes so as to restore the provision of 1842 against smuggling. Up to this time no authoritative definition of the word as used in the section thus amended had been given. It is presumable, therefore, that it is used in the same sense as in the Anti-Moiety Act of 1874; for it can not be supposed that the Congress of 1877 should in adopting a new criminal statute use words in a sense different from that with which they were already defined on the statute book, without giving them a new definition.

It remains, then, to inquire whether the diamonds were actually smuggled, within the statutory definition of 1874. Whatever the intent of Loesewitz may have been, there can be no doubt that Keck intended to defraud the United States. Either Loesewitz withheld part of the story, and he and Keck both had a criminal intent in this degree, or else Keck was defrauding Loesewitz and the United States together, using the captain as a means for conveying the box of diamonds through the port of Philadelphia without paying duty thereon.

It is clear from the testimony that Loesewitz was ready to give up his box without first exhibiting it to the customs officials. He said, according to Gallen, "Show me the order and I will go and get the package;" and on being asked to get the package first, went and got it, asked Gallen for the order, and did not until then learn that he was a Treasury agent. Mr. Cummings' testimony is substantially the same.

Had he suspected that the package was valuable he certainly would have avoided exhibiting it, for fear of

the penalty for carrying unmanifested goods (Rev. St., § 2809); knowing, also, that it would not be admitted to entry (act of June 10, 1890, c. 407, § 4).

His own testimony varies slightly from the others, as he says that he learned of their being Treasury agents before he went to get the package. This is immaterial, however, for he does not attempt to deny, although himself also under indictment and therefore interested in making himself out as innocent as possible, that he was willing to give the package up at once without stopping to exhibit it to the custom-house inspectors.

Keck's intent to defraud is clearly shown by his statement to Loesewitz that the package did not "contain any valuables." Nobody would have entrusted another man with $6,000 worth of diamonds with such a statement, except for the purpose of using the other man as an instrument by which to commit a fraud upon the United States.

The intent to defraud is thus clearly established.

Were the goods imported?

They were imported at the very moment when the vessel entered the port of Philadelphia.

It was originally claimed by the Treasury Department that goods are imported into the United States as soon as they arrive within the limits of a collection district. This contention was overruled by the courts, but it was always admitted that the importation was complete when the goods reached a port of entry. (*United States* v. *Vowell*, 5 Cr., 368; *Arnold* v. *United States*, 9 Cr., 104; *Meredith* v. *United States*, 13 Pet., 486, 494; *Harrison* v.

Vose, 9 How., 372, 382; see also *United States* v. *Lyman*, 1 Mason, 482, 499.) The latter question came up directly before Mr. Justice Curtis in *United States* v. *10,000 Cigars*, 2 Curtis, 436. That was a forfeiture proceeding against certain cigars which had not been landed. The learned justice said:

> An importation is complete when the goods are brought within the limits of a port of entry with the intention of unlading them there.

It has been recognized in our statutes, from the earliest times, that an importation is complete when the goods are brought within a port of entry, even if the intention is to reexport instead of to unlade. Thus the Collection Act of August 4, 1790, c. 35, § 18, provides:

> That it shall be lawful for the said ship or vessel to proceed with any goods, wares or merchandise brought in her which shall be reported by the said master or other person having the charge or command of the said ship or vessel, to be destined for any foreign port or place from the district within which such ship or vessel shall first arrive, to such foreign port or place, without paying or securing the payment of any duties upon such of the said goods, wares, or merchandise as shall be actually *re-exported* in the said ship or vessel accordingly.

Goods cannot be "re-exported" unless they have been imported. This provision was repeated in the Collection Act of March 2, 1799, c. 22, § 32, and with some changes in the act of February 22, 1805, c. 18, § 2, which now appears in the Revised Statutes as § 2776.

The act of August 6, 1846, c. 84, § 1, now incorporated in the Revised Statutes as § 2979, also recognizes that

landing upon our soil is not necessary to the act of importation by providing "an entry to re-export" merchandise which is to be "landed out of the jurisdiction of the United States." The Customs Regulations of 1857 accordingly provided a form of "entry for warehouse and exportation" on proof that the goods "are to be exported immediately by sea beyond the limits of the United States," and provided that upon receiving such an entry, the collector and naval officer "shall issue a permit addressed to the inspector of the vessel by which said goods were imported, directing him to send said goods to the vessel in which they are to be exported, the import vessel being considered the warehouse;" provided "an opportunity exists for immediate export" (Art. 477). Corresponding provisions are to be found in the Customs Regulations of 1892 as Articles 602, 603.

In 1885 certain sugar was brought into the port of New York for re-export in the same vessel to England. Whether it could be done under the customs acts and regulations was a question submitted to Judge McCue, then Solicitor of the Treasury. His opinion of April 29, 1885, is incorporated in Syn. Dec. 6896. He said: "Upon the arrival of a vessel at the port of entry, with intent to unload, the importation is complete." After describing the statutes and regulations, he says: "All these proceedings are necessary for the protection of the revenue if the goods are actually unladen; but in the case presented the goods imported are not unladen. * * * In view of the provisions of the law, I think that in the case presented a customs entry for warehouse and exportation may be made accurately describing the

goods to be exported; that for this purpose the vessel may be made the warehouse; and that the exportation of the cargo may be made in the same vessel," etc. His advice was followed, and the precedent gave rise to a special regulation for such cases. (Customs Regulations, 1892, Art. 605.)

The question when an importation becomes complete often arises under the act of March 28, 1854, c. 30, now Rev. St., § 2971, providing that "goods remaining in public store or bonded warehouse beyond three years shall be abandoned to the Government." In *Hartranft* v. *Oliver*, 125 U. S., 525, 529, this court, speaking by Mr. Justice Field, approved the Treasury regulation of 1857 which construed this clause so that "the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard after the arrival of the ship in port." This case arose under a certain provision of the tariff act of March 3, 1883, c. 121, which went into effect on July 1 of that year. A certain vessel arrived at Philadelphia on June 30, but the goods were not unladen until after July 1. The custom house officers of course took charge when the vessel arrived. The question arose whether on July 1 the goods were in a public store or bonded warehouse within the meaning of § 10 of the act. The court said:

> Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a

> ship, in charge of a custom house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. * * * We are therefore of opinion that, within the spirit and intent of the 10th section of the act of March 3, 1883, the goods were not chargeable with duties whilst on board the bark [etc.].

Some of the remarks of Judge Sawyer in the case of *McLean* v. *Hager*, 12 Sawy., 473, made prior to this decision, are therefore not strictly accurate, although the case was properly disposed of.

Upon like grounds, goods imported from the British provinces in steamers stopping first at Eastport must be entered and assessed there, although they are not to be actually landed until they arrive at Portland or Boston. (*Saltonstall* v. *Russell*, 152 U. S., 628.) So also "when goods have arrived at the port of New York, and the arrival of the vessel has been reported at the custom house and then the goods, with the consent and allowance of the collector under the provisions of the first and second sections of the act of June 10, 1890, have been shipped to Chicago, such goods must be deemed to have been warehoused from the time of the arrival of the ship." (*Seeberger* v. *Schweyer*, 153 U. S., 609, 613.)

In *Kohne* v. *Insurance Co.*, 1 Wash. C. C., 158, 165, Mr. Justice Washington, in charging the jury, says: "The literal meaning of importation is to bring in with intent to land." To bring in with intent to land certainly constitutes an importation. The only criticism

that can be made upon this definition is that it omits to cover such a case (not relevant here) as a bringing in with intent to re-export (*supra*), or the importation of a boat not intended to be put ashore (Syn. Dec. 7048, 7061, 7937, 8901, 8975; act of April 18, 1874, c. 110). By thus restricting the definition, the learned justice gave perhaps an over-technical construction to the act of 1799; but his definition is broad enough to cover the case at bar. The same definition is given by Mr. Justice Story in *Schooner Mary and Cargo*, 1 Gall., 206, 209:

> As to revenue laws, I am well satisfied that an importation into the United States means not merely a bringing within our jurisdictional limits, but also a bringing into some port, harbor, or haven, *with an intent to land the goods there*. It is undoubtedly true that the mere act of coming into a port, though without breaking bulk, is *prima facie* evidence of importation [etc.].

Goods which have arrived in port have always been regarded as subject to customs duties unless specially exempted therefrom, even if they be at once transferred to another ship for export, so that they "always were water-borne and never touched the land," as decided in 24 Elizabeth (12 Co., 18). In *Leaper* v. *Smith*, Bunbury, 79, it was decided by the Exchequer in 1721 that goods "shall be deemed an importation if within the limits of the port," etc.

The words "bringing into the United States" in the Anti-Moiety Act seem clearly equivalent to "importing into the United States." The case at bar therefore comes within the narrowest definition of the word "smuggling."

The goods were brought into a port of entry in a vessel which was in the custody of the custom house officers. They were brought with intent to land them without passing through the custom house or submitting them to the officers of the revenue for examination. They were brought with intent to defraud the United States.

If, however, the phrase "bringing into the United States" means something more than importation, still the case would come within the other clause of the Anti-Moiety Act relating to "attempting to bring into the United States." If the former phrase requires the goods to be put ashore, the latter phrase surely is met when it appears that the goods were on board a vessel tied to the wharf, and that their clandestine transit through the custom house was stopped only by the captain's mistake in supposing his callers to be agents of the owner instead of agents of the United States Treasury.

Nor would even an intent on the captain's part to show the goods to the customs officers be material to establish *against Keck* a charge of attempting to bring, etc. He clearly contemplated no such action on the captain's part.

The case being one of smuggling, it is unnecessary to consider here the words "clandestinely introduce" in the statute (see VI, *infra*).

IV.

The refusal of a dedimus potestatem was no error.

Keck was indicted May 18. He had been arrested February 15 and bound over to the Grand Jury February 18 (pp. 11–12). On May 26 he filed an application "for a *dedimus potestatem* to take depositions at Amsterdam,

Holland, and Antwerp, Belgium, in pursuance of § 866 of the Revised Statutes" (p. 6). Affidavits having been submitted upon both sides, the court denied it upon the following grounds (p. 11):

> First. That the statute relied upon is not applicable to the criminal court nor to trials of causes therein.
>
> Second. That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear it should be held that the application comes too late; that it might have been made months ago, and all delay in consequence of granting it avoided.

§ 866, upon which the application was based, is as follows:

> In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage. * * *

It is submitted that the statute does not permit the issuance of a *dedimus potestatem* in a criminal case; and that if it did, the action of Judge Butler is not reviewable.

(1) *A dedimus potestatem can be issued in civil causes only.*

The provision is taken from the Judiciary Act of September 24, 1789, c. 20, § 30. That section, after providing at great length for depositions *de bene esse*, contains the following proviso:

> *Provided*, That nothing herein shall be construed to prevent any court of the United States from

> granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess. * * *

The main provisions of this section with relation to depositions *de bene esse* are expressly confined to civil causes. It is therefore to be presumed, the statute being one drafted with great care, that the proviso is likewise confined to civil causes. (*Wayman* v. *Southard*, 10 Wheat., 1, 30; *Minis* v. *United States*, 15 Pet., 423, 445; *Voorhees* v. *United States Bank*, 10 Pet., 449, 471; *The Irresistible*, 7 Wheat., 551; *City of Chicago* v. *Phœnix Ins. Co.*, 126 Ill., 276; *Wolf* v. *Bauereis*, 72 Md., 481, 485.)

The act does not provide a complete system of pleading and practice. It assumes that the pleading and practice then known to "common usage" shall continue; and the proviso was not inserted for the purpose of providing a new remedy, but for the purpose of avoiding any inference that an existing remedy was taken away. The right to issue a *dedimus potestatem* after 1789 still continued to be governed by former usage, and did not become in the proper sense of the term a statutory right.

In an early case this court ruled that the words "common usage" applied in each State to the usages of that State, including those dependent upon its legislative acts. (*Buddicum* v. *Kirk*, 3 Cranch, 293.) This case arose in that part of the District of Columbia which was formerly contained within the limits of the State of Virginia; and the *dedimus potestatem* was held to be governed by a Virginia statute. That statute was adopted in 1792 (Virginia

Code, 1802, p. 279), but was a mere copy of an act of 1788 (12 Hening, Stat. at Large, 747). The decision therefore throws no light on the question whether the phrase "common usage" applies only to the usage of 1789, or whether it intends to adopt in each State its subsequent statutory provisions as from time to time they are enacted. The former view was adopted by Judge Choate in *United States* v. *Pings*, 4 Fed. Rep., 714, 716. (See *Bischoffscheim* v. *Baltzer*, 10 Fed. Rep., 1; *United States* v. *Parrott*, McAll., 447, 456.)

Whatever may be the rule in civil cases, it is respectfully submitted that no changes in criminal practice by State legislation could affect the Federal procedure. It has been laid down in the strongest terms that criminal procedure in Federal courts is not governed by the express provisions of the Judiciary Act, or by any State legislation subsequent to 1789, but that as to each of the thirteen original States the criminal procedure as it existed in that year must govern, except so far as it may be affected by subsequent Federal statutes. (*United States* v. *Reid*, 12 How., 361, 363, *per* Chief Justice Taney; *Logan* v. *United States*, 144 U. S., 263, 300–1; see *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555, 582; *United States* v. *Insley*, 12 U. S. App., 125, 130; *United States* v. *Hall*, 53 Fed. Rep., 352.) The courts had no power at that time in any of the States to order the taking of depositions in criminal cases. Even, therefore, could the proviso in § 30 be construed as broader in scope than the provisions to which it was appended, it could have had no practical application in criminal procedure.

In *United States* v. *Cameron*, 5 McCrary, 93, it was held that § 866 of the Revised Statutes, being affirmative in form, and not a mere proviso, was broader in its application than the Judiciary Act, and was intended to adopt the usage, common law and statutory, of each State as it existed in 1874 when the revision was made. A *dedimus potestatem* was therefore held to be proper under the Missouri practice. Similar changes in language are not infrequent in the Revised Statutes, turning the provisos of earlier legislation into affirmative enactments. The presumption is always that the revisers did not intend to change the prior law (*United States* v. *Le Bris*, 121 U. S., 278; *McDonald* v. *Hovey*, 110 U. S., 619, 628; *United States* v. *Ryder*, id., 729, 740), unless their language revision is so clear as to admit of only one construction, as in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 1, 39.

It is not necessary, however, to discuss the case of *United States* v. *Cameron*, because the State of Pennsylvania has never introduced the writ of *dedimus potestatem* or anything similar into its criminal procedure.

(2) *Were it possible for the court to grant the dedimus potestatem in this case, the application would be addressed to its discretion, and therefore its action would be unreviewable.*

In § 866 the language is that the court "may grant," etc. This is clearly one of those applications which are unreviewable upon writ of error. (*Goldsby* v. *United States*, 160 U. S., 70, 72, 73.)

Indeed, there was no way in which Judge Butler could have granted relief to Keck in this manner except by refusing to try the case unless the District Attorney consented to some method for taking depositions abroad, as was done in the case referred to by Lord Mansfield in *Mostyn* v. *Fabrigas*, 1 Cowp., 161, 174, where in a criminal prosecution for a pension fraud the defendant's witnesses being all in Scotland, the court refused to try the case until the prosecutor consented "that the witnesses may be examined before any of the judges of the Court of Session or any of the barons of the Court of Exchequer in Scotland, and that the depositions so taken should be read at the trial." It will be perceived from the form of this order that there was no established practice like that of a *dedimus potestatem* to which the court were able to refer, but that a practice was contrived to fit the case.

In *United States* v. *Wilder*, 4 Woods, 475, referred to by Keck's counsel, the judge granted a *dedimus potestatem* in a smuggling case, but reserved the question of admissibility of the evidence to the trial, stating that according to his information the practice was prevalent in the State courts in Georgia, and that if the testimony were inadmissible before the jury, he would consider the evidence thus obtained when he came to sentence the prisoner.

It seems to have been with such cases as these in mind that Judge Butler pronounced the application too late. Had there been any "common usage" in Pennsylvania by which a prisoner could apply for a *dedimus potestatem*, it might have been inapplicable until after indictment. As, however, the application was simply addressed to the

sympathy of the court and could be made of practical value only by some such method as that described by Lord Mansfield, the prisoner could make his application as well in February as in May. Had the application been made promptly, a month or more before the term, it might have been proper for the judge to require the District Attorney to waive all objections on pain of indefinite postponement of the trial; but he would doubtless have required a counter-stipulation on the part of the prisoner to waive objections to the taking of depositions also on behalf of the Government. This would have been only fair, and rights based upon the Constitution, as well as those based upon mere statutes, may be waived—the right to be confronted with witnesses included. (*United States* v. *Loughery*, 13 Blatchf., 267; *People* v. *Guidici*, 103 N. Y., 500, 508; *Reynolds* v. *United States*, 98 U. S., 145, 160; *United States* v. *Gale*, 109 U. S., 65; *Matter of Cooper*, 93 N. Y., 507; 1 Bish. New Crim. Proc., § 1205.)

V.

The rulings upon points of evidence were correct.

Questions of relevancy arising upon offers of circumstantial evidence are largely within the discretion of the trial judge, whose rulings in admitting such testimony (*Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah*, 159 U. S., 510, 518; *Goldsby* v. *United States*, 160 U. S., 70, 73) or excluding it (*Alexander* v. *United States*, 138 U. S., 353) are not reviewable, at least except for a clear abuse of discretion.

Defendant objects to the admission of the testimony that Captain Loesewitz gave Treasury Agent Gallen so good a description of Keck that Gallen was enabled to pick him out among a large crowd of people by the description (pp. 46–7). It is suggested that this evidence is hearsay. It would be hearsay if its object were to establish for the benefit of the jury the true description of Keck's personal appearance. This was not the object, however. Keck was sitting in the court room, and the jury were able to judge of his personal appearance by their own inspection. The important fact was not that Keck's appearance was so-and-so, but that the captain had stated it to be so-and-so. It will be remembered that he was unable to remember Keck's name. His ability to describe Keck's appearance was, therefore, of very great weight as confirming the accuracy of his own story. If he had been engaged in smuggling for the benefit of somebody else, and had concocted this story for the purpose of transferring the blame to Keck, he would have been able to remember Keck's name. The fact, therefore, that he was able to describe Keck, although unable to name him, was one of very great importance in the case.

Defendant also objects to the exclusion of his own offer to prove that Mr. Keck's firm imported only rough diamonds; the object of this evidence being "to show there was no motive on the part of these gentlemen to smuggle this stuff in" (p. 93). A man engaged in diamond cutting as a business is very familiar with the state of the cut diamond market in this country. He is thus

constantly aware of the immense profit obtainable by successful smuggling these articles. The fact that a man is engaged in a legitimate business can have no weight in his own behalf upon a charge of crime. He might as well have offered to prove that he was in the lager beer business or the umbrella business. The offer to prove that he was in the diamond cutting business only tended, for the reasons above stated, to prove that he was under peculiar temptation to smuggle. Indeed, Keck admitted that he was importing cut diamonds for another of his firms during the same month (p. 96).

Objection is also made to the exclusion of proof that for a year prior to January 27, 1896, "the name of F. Van Reeth frequently appeared in the public prints of Antwerp referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp obtained that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business" (p. 84). It is hardly necessary to discuss this objection, especially since the captain, although a native of Antwerp, was running a steamer between New York and Liverpool, seldom read the Antwerp papers, and had testified on cross-examination that he had never seen the particular paper referred to by defendant's counsel (pp. 38–9).

VI.

No prejudicial error can be found in the court's instructions to the jury, or in the refusal to instruct as requested by defendant.

Defendant first excepts to the charge "that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here is true, the defendant is guilty of the offense charged" (p. 112). This is substantially equivalent to charging that if the Government testimony is true, the defendant is guilty of the offense charged; and so far as it might tend to confine the jury's attention to the captain's testimony as representing the Government case, it would not be prejudicial to defendant. The court, however, went on to discuss the other testimony to some extent, and left the whole case to the jury. Defendant objects in his brief that "there was nothing said at the *Café Alsacienne* as to smuggling of the diamonds or omitting to submit the same to the officers of the revenue for inspection of the same after the arrival of the ship in port." In other words, he objects that his (Keck's) own intent to defraud was not expressly testified to by the captain. The intent to defraud was, however, an absolutely unavoidable inference from Keck's conduct at Antwerp as described by the captain. Who would ever have entrusted a $6,000 box of diamonds to the most trustworthy person, without telling him of its value, except for some very controlling reason? And what possible reason could exist for doing so in the present case except the desire to induce the captain to send along the package without invoicing, manifesting, declaring, or exhibiting it?

Moreover, it is a misdemeanor under this section of the statute either to smuggle goods or to clandestinely introduce them. The words "clandestinely introduce" must

be construed as having a meaning of their own, since "a statute ought upon the whole to be so construed that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–16; *Rice* v. *Railroad Co.*, 1 Bl., 358, 378–9.) The meaning and intent of these words is clear. They are intended to enlarge the meaning of the statute and make its provisions the more safe from evasion, somewhat as the words "and enterprise" are employed to give a wider scope to the provision against military expeditions. (*Wiborg* v. *United States*, 163 U. S., 632, 650.) ~~Intent to defraud may be a difficult thing to prove. A mere clandestine introduction of goods is therefore made likewise a misdemeanor, punishable under the same statute.~~

It is a crime to "clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law and which should have been invoiced, without paying or accounting for the duty." When the captain of a steamer imports goods belonging to another man without putting them upon the manifest, the importation is clandestine, and when the vessel enters a port of entry, they are clandestinely introduced into the United States. Can there be the slightest claim that Keck intended the goods to be put upon the manifest? In that case he would have shipped them in the usual manner, and would not have left them in the hands of a man unacquainted with their value.

It was not necessary for the court to explain the statutory provisions fully, because this appears already to have

been done by counsel; and as the court does not specify which counsel, it may be presumed that there was no controversy at the bar as to their true interpretation.

The court charged as requested upon the subject of reasonable doubt (pp. 111–12). Its further comment on the interpretation of this request to charge is sufficient to fulfil the requirements of the law. (*Dunbar* v. *United States*, 156 U. S., 185, 198.) Here again defendant complains of the court's reference to the testimony of Captain Loesewitz; and here again we answer that, if it tended to confine the jury's attention to the captain's own testimony as distinguished from the Government's case in general, it did not thus prejudice the prisoner.

VII.

The sentence appears to be erroneous under § 5541 of the Revised Statutes and *In re Bonner*, 151 U. S., 242, as claimed by defendant. It seems, therefore, necessary to remand the case to the District Court with instructions to enter a valid judgment upon the second count of the indictment, as was authorized in that case and done in *Ballew* v. *United States*, 160 U. S., 187. The District Court will be able easily to remedy the error by making the term of imprisonment a year and a day instead of a year simply.

EDWARD B. WHITNEY,
Assistant Attorney General.

No. 551. Sup. Ct. 1896.
Sup. Ct. Dec. of Atty. for Def. in Error

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 551.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 551.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error (Record, p. 46) objected to a certain question without stating any ground of objection. His present point—that it referred to a conversation too late to be part of the *res gesta*—was clearly not caught by the trial judge, as appears by the latter's remark just prior to the question. The conversation, indeed, was no later than one of those held competent in *Insurance Co.* v. *Mosley*, 8 Wall., 397, 399, 404, and case cited at p. 407. (See also 1 Whorton on Evidence, § 261.)

In the haste with which the brief had to be written, the undersigned failed to call attention to certain defects in the time and manner of objecting, which he now respectfully asks the court to notice.

The smuggled diamonds in question having been seized at Philadelphia in the hands of Capt. Loesewitz, the prosecution's main witness, the captain, on the day after the seizure, told Mr. Gallen, a Treasury agent, that he got them from a man in Antwerp. At the time of seizure he had said nothing. The following occurred on the trial during the direct examination of Gallen (pp. 45–6):

By the DISTRICT ATTORNEY:

Q. Did he say whether he knew what was in the package?

A. He said he didn't know what was in the package.

Q. Did he say anything when the box was opened and the diamonds displayed?

A. He said he didn't know the contents of that package.

Q. What took place next day?

A. The next day he called at my office, and I asked him if he had any explanation to make.

(Objected to.)

The COURT. His declarations can not be used against the defendant. What this man said when the diamonds were first found upon him might be evidence as part of the *res gesta*, and it would be safe to admit it, but what he said afterward certainly is not evidence against this defendant.

By the DISTRICT ATTORNEY:

Q. Did the captain give you a description of the man who gave the diamonds to him?

(Objected to. Objection overruled. Exception allowed for defendant.)

A. Yes, sir.

Q. What was the day when he gave you the description?

A. The day after I seized the diamonds.

Q. What was the description that the captain gave of the man whom he alleged gave him, the captain, the diamonds?

A. He described him as a man about the size of Collector Reed, not quite as stout, a small, reddish-brown mustache, small features, small eyes, and blonde complexion.

By the COURT:

Q. Did he name the man?

A. No, sir; he could not give me his name.

Q. That is, he did not remember it?

A. He did not remember it.

Mr. Gallen further testified that, a day or two later, he identified defendant from this description (pp. 46–7).

In criminal, as in civil cases, an objection must be made sufficiently specific to enable the trial judge to rule upon it intelligently. "The only objection consists of the two words 'objected to.' A mere objection where no grounds for it are assigned at the trial can not be considered in an appellate court." (*United States* v. *Shapleigh*, 12 U. S. App., 26, 46.)

The rule is long settled in the Federal courts (*Burton* v. *Driggs*, 20 Wall., 125, 133; *Toplitz* v. *Hedden*, 146 U. S., 252, 255; *Wood* v. *Weimar*, 104 U. S., 786, 795; *Charleston Co.* v. *Joyce*, 8 U. S., App. 309 and cas. cit.; *Walsh* v. *Colclough*, 9 id., 537, 545; *Ward* v. *Manuf. Co.*, 12 id., 295, 303). Authorities to the same effect in State courts are cited in large numbers in 1 Thompson on Trials, § 693, and Elliott's Appellate Procedure, § 779.

One reason for this rule is that the trial judge may not be misled. Sometimes an objection is argued at *nisi prius*

on an insufficient ground, a sufficient ground being wholly overlooked. It appears in the record as "objected to." Very often an objection is thrown in without any known ground, in hopes of discovering something to support it pending appeal, and thus obtaining a new trial with consequent long delays, when the objection, if made specific, would have been sustained. *Interest reipublicæ ut sit finis litium.* Hence the above rule.

It is impossible to tell what ground of objection, if any, was in the minds of court or counsel. It is probable that counsel had no definite point in mind, else he would have renewed the objection later on. The question to which he did object merely asked whether—time not specified—the captain had given Mr. Gallen a description of Keck. The court had already stated that all declarations of the captain after the first interview were incompetent against the defendant, but the mere incident that the captain gave a description of Keck was proper enough to admit. Such incidents are commonly admitted in evidence, leaving counsel to put in their objections if the line of testimony is followed further. The time to object was when the description was called for, or when Mr. Gallen subsequently testified that he identified Keck by the description.

At neither of these times did defendant object. By permitting the question "What was the description," &c. (there being no claim that the permission was by inadvertence), he lost his right to object to the answer. By a well-known rule a party can not stand by and see whether an answer will be favorable, and then, if unfavorable,

endeavor on appeal to remedy his mistake in speculation; or if, as often happens, he is trying for effect on the jury by waiving all technicalities, he has no right to insist on the technicalities afterwards.

Assuming the description, and Mr. Gallen's subsequent recognition of Keck therefrom, to have been objectionable, had they been objected to, yet the general rule which would have excluded them would have imported no unfairness in this particular case. There is every indication of entire good faith on the captain's part in giving the description of the man whose name he had forgotten. No real injustice would be done defendant by holding him to a rule of practice as strict as the rule of evidence to which he now seeks to appeal.

In order to sustain his objection, counsel seeks to connect it with a clause in the charge to which also he failed to object at the time; but there is nothing in the record to show that this particular piece of corroborative testimony is one of those to which the court alluded.

It is, however, a matter of constant experience at trials that matters which under strict rules are incompetent come in through failure of counsel to object, and even turn out to be of supreme importance in the case. Their entrance into the case is one of the chances of war, of which plaintiff and defendant run equal risks, and both sides are skirmishing throughout the trial to get them in. They are usually, as here, matters which are not intrinsically unfair, and not such as the rules of evidence were especially intended to bar out. Had they been,

opposing counsel would instinctively have perceived their objectionability and would have seasonably objected.

It is respectfully submitted that it is worse to reverse than to affirm in one of these cases.

EDWARD B. WHITNEY,
Assistant Attorney General.

No. 194. (Brief of Atty. Gen. (Keck) for D. C. Filed Jan. 18, 1898.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 194.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR UPON REARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 194.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR UPON REARGUMENT.

Although it was suggested in the former brief on behalf of the United States that the first count of the indictment is substantially in a form held insufficient in certain adjudged cases, it may not be improper, now that a reargument of the case is directed by the court, to discuss the sufficiency of that count, in view of the fact that the former brief was addressed principally to questions arising under the second count.

ADDITIONAL STATEMENT AS TO FACTS.

On page 9 of the original brief for the defendant in error, it is stated that the defendant was brought before

the United States commissioner on February 18, 1896 (Rec., p. 11), and that the date given by Captain Loesewitz, the witness for the Government, namely, March 18 (Rec., p. 28), seems to be an error. The fact is that there were two hearings. At the first, on February 18, the defendant was held for further hearing, and at the second, on March 18, he was identified by Captain Loesewitz and remanded to await the action of the grand jury. It is therefore true, as claimed by the plaintiff in error, that the captain produced the paper given to him by Keck in Antwerp, containing Van Reeth's address (Rec., pp. 50, 51), at the later hearing.

In the statement of the case on behalf of the plaintiff in error (Revised Brief, pp. 8, 9), the following account is given of the testimony of Captain Loesewitz regarding his disposition of the package containing the diamonds and the paper bearing Van Reeth's name and address:

> Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his stateroom and the paper in a card case in his pocket. Witness never put the package and slip of paper with the address on it together (original Rec., p. 78; printed, p. 34), but wrote the address on package himself (original Rec., p. 78; printed, p. 34), although package seized by officer had no address on it.

There are frequent references throughout the revised brief of plaintiff in error to this subject, and attention is called to the fact that the captain testified that the pack-

age given him in Antwerp had upon it an address, which he wrote thereon himself, while the package seized by the revenue officer had no address upon it (e. g., pp. 62, 63, 118, 130, revised brief). There is no doubt that the package had no address upon it when seized, but it is respectfully submitted that the testimony explains the discrepancy between this fact and the fact that the captain wrote the address upon the package himself.

On page 26 of the record Captain Loesewitz testified as follows:

> Q. I hand you a package, and ask you to look at it and tell me whether or not that is the package which was handed to you by Von Hemmelrick with the statement that it belonged to the defendant, Herman Keek?
>
> A. That is the package.
>
> Q. Was it in the shape, with respect to the seals and binding, that you now see it?
>
> A. It was in the same shape, *only the paper got torn off.* At that time the paper was right out and had those seals on *and no writing on it.*

On page 34 the same witness, under cross-examination, testified as follows:

> Q. Where did you put the package—in your pocket, loose?
>
> A. I put it loose in my pocket.
>
> Q. Where did you put the paper?
>
> A. Along with it; along with the box.
>
> Q. Loose?
>
> A. Along with the box.
>
> Q. You never tied the paper to it?
>
> A. No, sir.

* * * * *

By Mr. SHIELDS:

Q. You put that address loose in your pocket without attaching it to the package in any way?

A. Yes, sir.

Q. When you got aboard the ship where did you put the package?

A. In the drawer.

Q. Where did you put the paper?

A. *Afterwards* I put it in a little case.

Q. In a pocketbook or something of that kind?

A. Yes, sir; in a pocketbook.

By the court:

Q. Why did you not put the paper containing the address on the package? Why did you keep them separately?

A. *I kept that and put it afterwards with the package in another paper, and wrote the address on myself.*

Q. How is that?

A. I left off the address besides, and it was my minding to wrap that package in another paper when I arrived here, and then put the address on it. I intended to do that.

Q. Why did you not fasten the address and the package together?

A. Because I put it in my pocketbook—that address; *I did not do that at the time.*

This testimony shows that what the captain really did was to receive the package and the card, and to wrap them soon after their receipt together in one cover, upon which he wrote the address. Subsequently he took off that wrapping and put the original package without an address in a drawer in his stateroom, and the card or paper containing the address in a case or pocketbook.

Although there is some confusion in the details of this testimony, it is fair to conclude, under all the circumstances, that the apparent discrepancy as to the address is explained by these statements, showing that the captain at first wrapped the package and the card together and wrote the address on that outside covering, and afterwards took off that wrapping and placed them, separately, the one in a drawer and the other in his case or pocketbook, intending upon arrival here again to wrap the package in another paper and forward it to its destination.

ARGUMENT.

I.

The first count of the indictment is good.

The first count in the indictment is as follows:

> The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit, upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds of great value, to wit, of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made

> and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

It is based upon section 3082 of the Revised Statutes, which makes it criminal "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law." * * *

The Government admits the qualification imposed upon the rule that it is generally sufficient in framing an indictment under a statute to follow the statutory language, as stated by this court through Mr. Justice Harlan in *United States* v. *Simmons* (96 U. S., 360, 362) and followed in subsequent cases, viz:

> Where the offense is purely statutory, having no relation to the common law, it is "as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute, without any further expansion of the matter." (1 Bish. Crim. Proc., sec. 611 and authorities there cited.) But to this general rule there is the qualification fundamental in the law of criminal procedure that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.

But where the statutory language individuates the offense or the lack of particularity may properly be supplied by a bill of particulars, the general rule should be

the guide. In the case at bar we contend that the first count is good on these grounds.

Section 3082, Revised Statutes, was taken from the act of July 18, 1866 (14 Stats., 178). That act was entitled "An act further to prevent smuggling, and for other purposes." Although the language of the act may be held to include forms of importation contrary to law other than smuggling, that was the particular form of unlawful importation which was aimed at. It was so considered in the case of *United States* v. *Kee Ho* (33 F. R., 333). In this case the indictment was found under section 3082, and the court, Deady, J., says (foot of p. 334):

> The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling—the clandestine introduction of goods into the United States without passing them through the custom-house and with intent to defraud the revenue of the United States.

It is true the court further holds that the language of the act is broad enough to include other forms of illegal importation, which conclusion will be considered later. This decision was subsequent to the revision of the statutes, and the court apparently proceeds on the theory that the language of section 3082 is doubtful, and therefore may be subject to explanation by the original act.

The circumstances under which the courts may look at prior laws for which a revision is substituted are stated in *United States* v. *Bowen* (100 U.S., 508, 512–514), and *Bate Refrigerating Co.* v. *Sulzberger* (157 U. S., 1–39).

We contend that there is here such substantial doubt as to the meaning of the language used in the revision that the old law is a valuable and proper source of information. Importing contrary to law may include so many illegalities concerning the revenue that we may well assume that Congress had a definite offense in mind in framing this criminal statute, and properly look to the original law, as explained by its title, to learn what that was. Section 3082, therefore, by its language indicates smuggling as the offense described. Other forms of importing contrary to law, such as importing prohibited merchandise or in prohibited packages, could not properly have been embraced in this indictment, and defendant could not have been misled as to said charges by the use of the statutory terms. The importation of diamonds is not prohibited nor is any special form of package prescribed for their due entry. Similarly, the omission of goods from a manifest or the failure to produce a duly certified invoice could not have been covered by this count so as to mislead the defendant and prevent his proper preparation for trial, because the penalties prescribed for the omission of goods from a manifest, under sections 2809 and 2814, Revised Statutes, are directed against the master of the vessel and the goods; and while it is true that under section 2865 one of the elements of the crime of smuggling, as there described, is that the goods shall be such as should have been invoiced, and section 4 of the act of June 10, 1890 (26 Stat., 131), requires generally the production of a duly certified invoice before goods shall be admitted to

entry, nevertheless the mere omission of an invoice does not constitute a crime liable to punishment, and therefore the defendant could not have been charged with this offense under this count.

The offense committed, therefore, was described with reasonable certainty within the requirement of the rule. The averments of name, time, the quantity or number and character of the goods, were given with sufficient particularity, and the charge in the statutory language, or substantially so, of importation contrary to law apprised the defendant that the charge was for the definite and individuated crime of smuggling. The facts in detail were properly a matter of evidence, or they should have been called for by bill of particulars.

It is true that in the cases of *United States* v. *Kee Ho* (33 F. R., 333), *United States* v. *Claflin* (13 Blatchf., 178), and *United States* v. *Thomas* (4 Ben., 370) similar indictments were condemned.

It is respectfully submitted that we have in these cases, upon facts similar to the present case and similar to each other, two different and inconsistent rulings. In the Kee Ho case the court held that the particular averments might be rejected as surplusage, and then the indictment was bad for generality. In the Thomas case the court held that the particular averments could not be rejected as surplusage, and, as they did not constitute a crime, vitiated the indictment, although of opinion that if the indictment had been in general form it would nevertheless not have been good. In view of the dilemma suggested by these cases and the danger of particular averments thus illustrated, a pleader may well be justified in

relying on the general language of the section and in awaiting an order for a bill of particulars before stating the particular facts. These rulings and the considerations suggested by them were in all probability in the mind of the court below in sustaining this count of the indictment. They properly call for the application of the general rule permitting the statutory language under section 3082. These cases are referred to thus fully to point out the dilemma which they may have suggested to the pleader. But we contend that they are no longer of authority, but have been overruled by *Dunbar* v. *United States* (156 U. S., 185).

Considering now some of the recent cases decided by the court, in which it is held that more particular averments than the mere statutory language are requisite, in the case of *United States* v. *Cruikshank* (92 U. S., 542, 557) the court says:

> According to the view we take of these counts, the question is not whether it is enough in general to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire to injure, oppress, threaten, or intimidate any citizen with the intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States. These counts in the indictment charge in substance that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of every, each, all and singular the rights granted them by the Constitution, etc. There is no specification of any particular right. The language is

> broad enough to cover all. * * * In Maine it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison; but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law.

and the court conclude that the counts are too vague and general.

The case at bar, however, is not justly subject to the criticism of this case. The averments of time, place, person, and merchandise were duly made, and the only importation contrary to law of which the defendant could have been apprised under the indictment was the very offense charged, the further particulars of which could properly have been obtained by a bill of particulars. In the Cruikshank case the averments went beyond the statutory language in this respect, that they emphasized the generality of the charge and on that ground were regarded as too vague and lacking the certainty and precision required by criminal pleading. Strictly speaking, the decision does not condemn the use of the exact statutory language.

In *United States* v. *Mann* (95 U. S., 580, 586) it was held that the right conferred upon an officer under section 3177, Revised Statutes, to enter a building where articles subject to tax are made, produced, or kept, is strictly limited to such a building, and that paid bank

checks are not articles subject to taxation within the meaning of the section, unless it is alleged and proved that they were not duly stamped at the time they were made and issued, and for this reason the court concludes that the information does not set forth any legal offense. Here, as in the next case, an essential element of the crime was omitted. The statutory language was really not followed.

In *United States* v. *Carll* (105 U. S., 611) the indictment for uttering a counterfeit omitted to allege the knowledge of the defendant that the instrument was counterfeit, which is essential to make out that crime, and upon this ground it was held that the omission was a matter of substance and that the indictment was not sufficient.

In *United States* v. *Hess* (124 U. S., 483) the indictment was founded upon Revised Statutes, 5480, and alleged the unlawful use of the mails. The court held that the offense is not described with sufficient particularity under the section in question, and that the omission is a matter of substance and not of form, and therefore is not cured by the verdict. It is to be noticed here that although a scheme to defraud was alleged, no particulars of the alleged scheme were given, upon which the court held that the indictment was as insufficient as would be an indictment for larceny without stating the property stolen, or its owner, or the party from whose possession it was taken.

In *Pettibone* v. *United States* (148 U. S., 197) the indictment was, under sections 5399 and 5440, for corruptly endeavoring to influence an officer and for conspiracy.

The court remanded the cause with instructions to quash the indictment upon the ground that the acts constituting the conspiracy were not properly averred, in that it omitted the averment that the purposes of the confederation was the interruption of the course of justice in a United States court, and that the indictment did not charge that the defendants were ever served with process or otherwise brought into court. The court held (p. 209) that the unlawful act charged was not an offense against the United States, so that if the defendants were held guilty their conviction would rest upon a conspiracy to commit an act unlawful in another jurisdiction and itself a distinct and separate offense therein, and therefore to convict defendants of conspiracy to obstruct the administration of justice in a United States court because they were guilty of a conspiracy to commit an unlawful act as against the State, the evil intent presumed to exist in the latter case must be imputed to them, although ignorance would otherwise have constituted a defense, and the intent related to a crime against the State. The burden of the decision is that the indictment is defective because it does not really allege an offense against the United States. That is not the fact in the present case because to "import contrary to law" aptly describes an offense against the United States.

In *Blitz* v. *United States* (153 U. S., 308) the defendant was charged with knowingly personating and voting under the name of another at an election at which a Representative in Congress and also State officers were to be elected, and it was held that the indictment was fatally defective because it failed to charge clearly that the accused did vote

as a matter of fact for a Representative in Congress. The words of the indictment left it in doubt or to mere inference whether the offense charged was one within Federal cognizance. The court, page 315, states the general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statute, subject to the qualification that the accused must be apprised with reasonable certainty of the nature of the accusation against him, and proceed to say:

> The want of care in framing the first count is further shown by the fact that, although voting and attempting to vote knowingly in the name of another for Representative in Congress may be distinct offenses under the statute, the indictment charges that the defendant did knowingly personate and vote and attempt to vote in the name of another person. If the attempt to so vote was immediately followed by voting, then the allegation that the accused attempted to vote was unnecessary. The first count leaves it in doubt whether it was intended to charge two distinct offenses, or only the offense of voting in the name of another person.

The gist of this defect in the indictment was that it stated too much and left it uncertain whether one or the other or both of two charges possible under this section of the statute were made against the defendant.

The defect in this count of the indictment in the case at bar, if one exists, is matter of form, which can not be availed of by reason of section 1025, Revised Statutes, which provides, that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

The language of the court in *Connors* v. *United States* (158 U. S., 408, 411) is applicable to this case. In that case there was an indictment for the crime of having interfered with the officers of election in the discharge of their duties, in language describing the mode of committing the offense, "perhaps with unnecessary particularity." The court (p. 411) held that it was in the discretion of the court below to compel the prosecutor to state upon which form of the charge he would proceed; but as a proper motion for this purpose was not made, and this objection was urged for the first time after verdict, it is not available on a writ of error, and the court proceed (p. 411):

> Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged.

So in this case, where no application was made asking for a more specific statement of the particular mode in which the offense was committed, and as there is no doubt as to what the precise offense was, because the statutory averments sufficiently describe it, it should be held that section 1025 applies, since the defect is in matter of form not tending to the prejudice of the defendant.

In *Evans* v. *United States* (153 U. S., 584), in which the indictment was for embezzling the funds of a

national bank, various counts were objected to on the ground that they were not sufficiently specific. The court say (p. 590):

> While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the Government may be entrapped into making allegations which it would be impossible to prove.

And again on page 594:

> This subject, however, was so fully considered by this court in United States *v.* Simmons (96 U. S., 360, 364), that it is needless to dwell upon it more at length here. In that case the indictment averred that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller * * * with intent to defraud the United States of the tax on the spirits distilled by him." It was held not to be necessary to state the particular means by which the United States was to be defrauded of the tax. "The defendant," said the court, "is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice."

This ruling aptly applies to the case at bar. It is not necessary to state in the indictment the particular means by which the illegal importation was accomplished.

But if the language of the first count is too general, the defendant's remedy was by bill of particulars.

The general principles upon which a bill of particulars is ordered are as follows:

A bill of particulars should be applied for whenever the indictment is so general as to give to the defendant inadequate notice of the charge he is expected to meet, and upon application the court will require the prosecution to furnish a bill of particulars for the specific charge to be pressed or the evidence intended to be relied upon. (Whart. Crim. Pl. and Pr., 9th ed., sec. 702.) It is there stated that indictments may be thus general and yet in entire conformity with precedent, and hence has arisen the practice of requiring bills of particulars in such cases. The adoption of such bills, instead of exacting increased particularity in indictments, is productive of several advantages, e. g., it prevents much cumbrous special pleading and consequent failure of justice, and gives the defendant in plain and unartificial language notice of the charge he has to meet.

> An indictment which the court can not pronounce ill may still omit details to which the defendant is justly entitled before trial. Thereupon the judge, if applied to, orders a written specification of things, called sometimes, and perhaps generally, a bill of particulars, to be filed with the papers in the cause, and on the trial restricts the prosecuting officer in his evidence to the items therein set down. (1 Bishop's New Criminal Procedure, sec. 643.)

There are no unvarying rules requiring particulars in one class of offenses and not in another, and no consid-

erations can be advanced why the practice should not be pursued in offenses under revenue laws as well as in conspiracy or embezzlement. Indeed, since the former offenses are especially secret in their nature and methods, the prosecution should be allowed with great reason to state the offense in the statutory language, and await an application for particulars in which to give the special facts. This does not hinder or embarrass the prosecution, and yet preserves the substantial rights of the defendant. Nor would this substitute "indictment by the district attorney" for indictment by the grand jury, as suggested by the learned counsel for the plaintiff in error.

In *Ex parte Bain* (121 U. S., 1), cited by him, there was no question as to a bill of particulars, but it was held that after an indictment is filed no change can be made in the instrument by order of the court or by the prosecuting attorney without resubmission to the grand jury. A bill of particulars, it is true, is not a substitute for a necessary averment, nor can it supply a defect in substance in the indictment. But we hold that in this case the defect, if any exist, is not in matter of substance, but of form, which can properly be supplied by a bill of particulars. All the necessary averments as to time, place, and merchandise were made with sufficient particularity, and the only information necessary to be elicited by a bill of particulars was the facts in which the illegal importation consisted. The pleader was justified, in view of the strictness of proof required, in withholding these allegations from the count. It was

an indictment which the court could not pronounce ill, and as to which it doubtless was prepared to order the particulars upon due application.

In cases not to be distinguished on principle from the one at bar, this court has held or suggested that an application for a bill of particulars would have been the proper course.

In *Durland* v. *United States* (161 U. S., 306) the indictment charged the use of the mails with intent to defraud. It partially identified certain letters, but did not give their contents. The court say (p. 315):

> It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant, "intending in and for executing such scheme and artifice to defraud, and attempting so to do, placed and caused to be placed in the post-office," etc. This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars.

In commenting on the Durland case in reference to the second count of the indictment the learned counsel for plaintiff in error says (revised brief, p. 45):

> The indictment identified the letters, but did not give their full contents. The court properly held that the contents should have been obtained by

demanding a bill of particulars. In the indictment of the case on trial there was no identification of the diamonds at all.

The diamonds were identified in the indictment by number and value. Further specifications could have been obtained upon application to the court for a bill of particulars, and such an application upon the first count of the indictment would have obtained the meaning of the statutory language of the indictment expressed in the facts which occurred. No reason can be perceived why the ruling of the Durland case does not properly apply to the case before the court.

In *Rosen* v. *United States* (161 U. S., 29) the indictment was for mailing obscene matter. The court held (p. 40) that the indictment should apprise the defendant of the crime charged with such reasonable certainty that he can make his defense, but that this right is not infringed by the omission of indecent matter not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that in such case the accused may apply to the court before the trial is entered upon for a bill of particulars, and that this motion will be granted or refused as the court, in the exercise of a sound legal discretion, may find necessary.

Although in the case just cited there was no demurrer to the indictment, and no question raised as to its sufficiency until after the verdict, the court does not rely

specially upon those facts in applying the rule as to a bill of particulars, and the argument of the court in that case justifies, if it does not authorize, the remedy by bill of particulars in the case at bar.

In *Dunbar* v. *United States* (156 U. S., 185) the indictment was for smuggling opium, under sections 2865 and 3082, Revised Statutes, the property being described as "prepared opium subject to duty by law, to-wit, a duty of $12 per pound." It was held that this was a sufficient description of the property subjected to duty by paragraph 48 of section 1 of the tariff act of October 1, 1890, and that it is no valid objection to an indictment if the description of the property is broad enough to include more than one specific article, although to make available a judgment on such an indictment in bar of a subsequent prosecution, something besides the record might be required to identify the property; and the rule was stated to be that if the description brings the property clearly within the scope of the statute and identifies it so as to enable the defendant to prepare his defense, it is sufficient. The court suggest that if the description of the property does not so clearly identify it as to enable the defendant to prepare his defense, he should raise the question by some preliminary motion or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged with a violation of the law.

Although in the case at bar the question was raised by demurrer, nevertheless the Dunbar case is authority for

the proposition that a bill of particulars, where there is doubt as to the allegations of the indictment, is the proper course by which a defendant may inform himself of the precise charges made against him.

The case in hand is one especially calling for the application of this rule. Crimes against the revenues, and especially the crime of smuggling, ought to be punishable with certainty and celerity, and, so far as rules of law permit, mere technical objections should not be favored. The crime is almost always so planned and carried out that it is very difficult to trace and detect, and if the Government is held to particularity of allegation of all the facts to the indictment, and accurate allegations of person, place, time, merchandise, and the statutory description of the character of the offense is held not to be sufficient, it would be difficult, if not almost impossible, to substantiate more specific averments by the proof; whereas, if the indictment is fairly sustainable under the language of the statute, all defect in detail is abundantly remedied without prejudice to the defendant by a bill of particulars. It is respectfully submitted that this was the proper remedy for the defendant in this case, and that the demurrer was rightly overruled in the court below.

The evidence sustains the conviction under this count.

The evidence clearly shows an importation contrary to law even under the limitation of that phrase herein contended for.

It was established by Captain Loesewitz's story, as corroborated to the satisfaction of the jury, that there

was a smuggling or clandestine introduction contrary to the provisions of section 2865, Revised Statutes, in reference to which it is sufficient to say that the facts clearly show a smuggling under the legislative definition given by the Antimoiety act of June 22, 1874 (18 Stat., p. 186), viz: "That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house or submitting them to the officers of the revenue for examination." Mr. Whitney's brief establishes the contention that this definition of smuggling, and not the common-law definition, is the proper one to be applied to the offense of smuggling under our revenue laws. There can be no doubt that the evidence at the very least shows acts, with intent to defraud, of attempting to bring dutiable articles into the United States without passing the same through the custom-house. Furthermore, section 3082 provides, "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The testimony of Captain Loesewitz as to the transactions at Antwerp shows that the defendant had possession of the diamonds. (Record, pp. 24, 25.)

II.

As to the second count, the evidence and the charge of the court.

The learned counsel for plaintiff in error contends that the second count of the indictment is not governed by *Dunbar* v. *United States* (156 U. S., 185), because the charge there was for the smuggling of "prepared opium, subject to a duty of $12 per pound," and since no prepared opium was on the free list of the tariff act of October 1, 1890 (26 Stat., 567), the opium must necessarily be covered by paragraph 48 of section 1 of the said act; whereas in the case before the court merely the generic term "diamonds" was used, and, even granting that diamonds were not on the free list under paragraph 467 of the act of August 27, 1894 (28 Stat., 509), there are three rates of duty for dutiable diamonds by paragraph 338 of the last-mentioned act. But the court say in the Dunbar case, per Mr. Justice Brewer (p. 190):

> If "opium" as there used does not exclusively refer to crude opium, and if opium prepared for other uses than that of smoking is, when containing less than 9 per cent of morphia, subject to the duty of $12 a pound, "prepared opium subject to duty of $12 per pound" can mean only opium prepared for smoking, which, irrespective of the amount of morphia contained in it, is subject to that duty, or opium having less than 9 per cent of morphia and prepared for other uses, which is also subject to like duty. In either case the property charged to have been smuggled is property within the very terms of paragraph 48.

Furthermore, the court holds that that paragraph is not the statute describing the offense and imposing the penalties, and that in the indictment under the sections in question any words of description which make clear the articles in respect to which the offense is alleged are sufficient. Under this ruling the diamonds in this case are sufficiently pointed out by the second count. They are properly covered by paragraph 338 of the tariff act of August 28, 1894, and naturally fall within the first clause of that paragraph as "precious stones of all kinds, cut but not set, 25 per centum ad valorem." The other provisions of the paragraph do not properly include such diamonds.

The ground of the decision in the Dunbar case was not solely that the two classes of merchandise which might have been embraced within the statutory language were dutiable at the same rate, but also that the property was within the very terms of the paragraph in question. Here the property is embraced in the terms of paragraph 338 of the tariff act of 1894. Even conceding that the paragraph prescribes more than one rate of duty for dutiable diamonds, the lack of particularity was properly remediable by a bill of particulars.

We contend, therefore, that if there was any omission in the second count of the indictment, it was not of matter of substance, but of matter of form, which was cured by section 1025, Revised Statutes.

Definition of smuggling.

Counsel for plaintiff in error objects that the indictment should allege facts showing how there was smuggling. He contends that common-law definitions of smuggling should be applied to this case. (See authorities cited in revised brief, p. 49.) But the conditions under which those definitions were framed are long past and have no application to this case. The crime here is a statutory one, and the statutory definition of smuggling given in the Antimoiety act of June 22, 1874 (18 Stat., 186), as contended in the original brief for the Government, is properly applicable to this case. Furthermore, the definition of smuggling in *Dunbar* v. *United States*, given by Mr. Justice Brewer on page 193, namely, "the fraudulent taking into a country or out of it merchandise which is lawfully prohibited," is satisfied by the facts of this case.

In the case of *United States* v. *Claflin* (13 Blatchf., 178) Judge Benedict adopted the definition of smuggling contained in the Antimoiety act. So far as known there is no other ruling of the courts on this question.

The allegation in the second count that the goods should have been invoiced is sufficient. It was not necessary to state that they were not personal effects accompanying a passenger under the exception in the act of June 10, 1890, which provides in section 4 as follows:

> That except in case of personal effects accompanying the passenger, no importation of any merchandise * * * shall be admitted * * * without the production of a duly certified invoice, etc.

It is not necessary that the indictment should state matters of evidence merely, or anticipate or negative matter of defense, especially where such matter is contained in a separate or subsequent statute. Captain Loesewitz was in no proper sense a "passenger" within the meaning of that act.

Under the definition of smuggling given by section 4 of the Antimoiety act, an attempt to smuggle was properly alleged and the facts show an attempt to smuggle within the terms of that act. The act provides that "for the purposes of this act smuggling shall be construed to mean the act with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same or the packages containing the same through the custom-house or submitting them to the officers of the revenue for examination." This is the definition of smuggling framed by Congress, and is properly applicable to all cases of smuggling, and includes in smuggling an attempt to smuggle in all cases since the act was adopted. As there was no common-law definition applicable to the offense of smuggling under the laws of the United States at the time this act was adopted, and as the act was on the books when the act of February 27, 1877, was passed amending section 2865 of the Revised Statutes, under which this indictment was framed, the definition given by the antimoiety act is clearly applicable to the offense of smuggling. The fact that the expression is used in that act that "*for the purposes of this act* smuggling shall be construed to

mean," etc., does not exclude its application to cases of smuggling generally, or for other purposes than those of the said act. Congress is presumed to have intended to apply that definition of smuggling, and not the common law definition applicable to earlier times and other conditions, when they passed the act of 1877 restoring in section 2865 of the Revised Statutes the provisions of the act of August 30, 1842 (5 Stat., 565), making it criminal to smuggle and clandestinely introduce goods, wares, and merchandise into the United States. What was smuggling for the informer was smuggling for the goods.

Counsel for plaintiff in error argues that, even if this legislative definition of smuggling and of an attempt to smuggle is adopted, the evidence fails to make out a case. He contends that at most there was an unexecuted intention to make an attempt to smuggle, or an attempt coupled with an intention to make an attempt to smuggle; that there is a clear distinction between an attempt and an intent; and that there were no overt acts toward landing the diamonds. It is sufficient to say that the attempt to smuggle, as distinguished from the intent, began with the transaction in the café at Antwerp, and was repeated in the various overt acts by which the diamonds reached the wharf at Philadelphia, and that to establish an attempt to smuggle under this act it is not necessary that an actual landing of the goods or proceeding to leave the vessel with the goods should exist. It should be remembered, also, that the captain offered to deliver the package to men whom he believed to be the representatives of

Keek, but who were customs inspectors. Was not this attempted delivery an overt act? Smuggling consists not so much in doing as leaving undone, and in every ordinary case the secrecy, when disclosure is a duty, is the overt act. No conviction could be had if an arrest were forbidden until after an opportunity to enter the goods had passed.

The court's rulings on the evidence were proper.

Captain Loesewitz gave a description of Keek to the revenue officer the day after the seizure of the diamonds. It was material, as testing completely the accuracy of the captain's story. It was not hearsay, but a fact in the cause. The captain stated (Rec., pp. 23, 24, 25) that he had met Keek in Antwerp and received the diamonds from him. Keek denied (Rec., pp. 98, 106) that he knew the captain or had ever seen him. If this were true, the captain could not give a description of him in all probability. No fact, therefore, was more important in corroborating the captain's story than the fact of his description of Keek. As will be seen by reference to the record, page 46, the court sustained an objection to anything the captain said to the revenue officer except when the diamonds were first found upon him; but the mere statement that the captain did give a description of Keek was not hearsay testimony, but a fact of importance, because Gallen acted upon it. The court sustained the objection as to what the captain said the next day, but admitted the testimony to the fact that a description was given. That testimony having been admitted, the dis-

trict attorney asked what the description was. The answer to this question would most probably have been excluded if the attorney for Mr. Keck had objected under the previous rulings of the court. No objection was however made, and therefore the plaintiff in error can not now take advantage of the subsequent admission of what the captain said. The chief objection to hearsay testimony is the inability to cross-examine the person whom the witness quotes. This reason does not exist in this case. The party quoted had already testified generally and to the specific fact of having given a description. (See folio page 66; printed, 27.) No objection was then made; the witness was fully cross-examined. The question asked of Gallen was therefore only cumulative. If the defendant had objected to the details of the description, why did he not move to strike it out?

As was said in the supplementary brief for the Government: "No real injustice would be done defendant by holding him to a rule of practice as strict as the rule of evidence to which he now seeks to appeal."

In the court's charge the language is that "it is sufficient to say that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged." This language merely describes the character and principal source of the testimony, and was equivalent to saying that if the facts in the case as charged are true, the defendant is guilty of the offense charged. So far as it tends to restrict the jury's attention to the captain's testimony as representing the Government case, it was not

prejudicial to the defendant, but was prejudicial to the Government in narrowing the case to one witness and then discrediting that witness. The captain's testimony, as corroborated, substantially established the case. The court fully cautioned the jury on the subject by pointing out the captain's interest, and adds:

> If, therefore, he stood alone, unsupported, you would naturally and properly hesitate to convict the defendant on his testimony, especially with the defendant's denial, which you have heard. The Government claims, however, that the captain is corroborated in important particulars and in such manner that it is not only safe to believe him, but that belief can not be avoided.

And later the court instructed the jury that from a careful consideration of all the testimony heard on both sides they must determine whether the defendant is guilty or not.

The answer of the court to the request No. 10 for the defendant (Rec., pp. 111, 112) instructs the jury satisfactorily on the subject of reasonable doubt. It is to be noted that the request called upon the court to charge that before the jury can find the defendant guilty the evidence must be consistent with *every* hypothesis of guilt and inconsistent with *any* hypothesis of innocence. This was a very broad request, and the court's charge properly modified it by holding the meaning of it to be that the jury shall be fully convinced from a careful examination of all the testimony that the defendant is guilty of the smuggling charged. The instructions were not modified to exclude in effect "the doctrine that all

the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence," as claimed by the learned counsel for plaintiff in error (revised brief, p. 150).

It is respectfully submitted that the judgment of the court below should be affirmed in this case.

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JAMES M. BECK.

JANUARY 15, 1898.